European Commission consultation
“Empowering the National Competition Authorities
to be more effective enforcers”

Some comments

We thank the European Commission for the opportunity to express some views on how the status and the powers of national competition authorities could be improved in order to enhance the effectiveness of EU competition law enforcement.

We respectfully submit that the use of a structured questionnaire leads to an artificial fragmentation of the reasoning, which does not seem appropriate to gather useful in-depth comments on the several important issues at stake. Therefore, in addition to filling the online questionnaire as requested, we enclose some observations in free form text, in line with the traditional approach, and encourage the Commission to reconsider which instruments should be used in public consultations to fruitfully collect information and comments from all interested parties.

The ten years’ experience of application of Regulation no. 1/2003 has shown that significant differences exist among NCAs with reference to independence safeguards and enforcement powers. While in some Member States, including Italy, the competition authority already enjoys a high degree of institutional independence and is overall well equipped in terms of resources and instruments to detect and tackle antitrust infringements, the situation in other Member States is less satisfactory. Therefore, a greater convergence of the main features of the institutional framework for national enforcement could help to achieve a more consistent and effective application of EU competition rules.

1. Independence of the NCAs

The recent experience in some Member States (for instance, Poland and Greece) has pointed out that safeguarding the independence of NCAs from political interference is an important issue in the EU. The credibility of the whole system of protection of competition, including compliance with the principle of equal treatment of national and non-national undertakings, strongly depends on the
indipendence of competition authorities from external influence when performing their tasks.

Threats to the independence of competition authorities may take different forms. In some cases, they may result from public policy measures that apparently pursue legitimate goals, like for instance stricter age requirements for the members of the NCA with immediate effect on the members in charge, or the merger of the NCA with other public authorities leading to the substitution of the board.

Several EU directives (on banking, telecoms, energy, railways, protection of personal data) already require that national enforcers of the rules are independent from external influence. The existing concerns in the area of competition law strongly suggest to provide in EU legislation an express legal basis also for the independence of national authorities in charge of the application of EU competition rules.

In particular, an explicit support to the independence of the NCAs in a EU legislative act would provide a more clear-cut legal basis for bringing actions against the relevant Member State before the Court of Justice in case of undue challenges to the independence of the NCA. Moreover, an express emphasis on the independence of NCAs might dissuade national governments from considering measures entailing undue interferences.

The natural way to reach this result would be to add some provisions to the rules already contained in article 35 of Regulation 1/2003. The most advanced model is provided by the draft General Data Protection Regulation (GDPR, 28 January 2016, 5455/16, Chapter VI, Section I - “Independent status”). We quote some of the relevant provisions contained therein:

- each authority shall act with complete independence in performing the tasks and exercising the powers entrusted to it in accordance with this Regulation;
- the member or members of each authority shall, in the performance of their tasks and exercise of their powers in accordance with this Regulation, remain free from external influence, whether direct or indirect, and neither seek nor take instruction from anybody;
- Member States shall provide that each member of the authority must be appointed by means of a transparent procedure;
- the members of the authority shall have the qualifications, experience and skills required to perform their duties and exercise their powers;
a member may only be dismissed in cases of serious misconduct or if the member no longer fulfils the conditions required for the performance of the duties; each Member State shall provide by law the rules on the establishment of the authority, including rules on the duration of the term of the members and rules on incompatible actions, occupations and benefits during and after the term of office.

2. Resources

The availability of adequate and stable resources is essential to ensure NCAs’ independence in carrying out their institutional tasks. In principle, since the public enforcement of competition law has an horizontal scope to the benefit of all undertakings and consumers – i.e., differently from regulatory independent authorities, the NCA’s action is not limited to a specific economic sector – funding from the general public budget seems to be the optimal solution.

In Italy, since 2012 the funding system of the AGCM is exclusively based on a mandatory fee charged on companies with a turnover exceeding 50 million euros. The fee was initially set at 0.08 per thousand of the turnover but, starting from 2014, the AGCM was able to reduce the rate to 0.06 per thousand, as a result of an appreciable spending review exercise. We do not perceive a lack of resources that might undermine the AGCM capacity to perform its duties.

In order to ensure that NCAs are endowed with sufficient resources in all Member States, it can be useful to add provisions to this aim in Regulation 1/2003. Once again, the draft GDPR contains some suitable provisions. It states, in particular, that:

- each Member State shall ensure that the authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers;
- Member States shall ensure that the authority is subject to financial control which shall not affect its independence and has a separate, public, annual budget which may be part of the overall state or national budget.

1 In order to strengthen this safeguard, it might be specified that the relevant conditions are the ones provided by the law at the time when the member has been appointed.
Moreover, as far as the resources of NCAs are concerned, some further principles should be taken into account for the proper operation of the system:

- whenever NCAs are not funded through the general public budget, their funding system should be designed in a way which does not distort the incentives of the authority in the performance of its institutional duties. In particular, NCAs should not be allowed to collect financial resources from the fines they impose, because this may hamper public trust in the impartiality of competition law enforcement;
- the human and financial resources available for the application of competition rules may become insufficient if the NCA is given additional labour-intensive institutional competences. As underlined in the Commission Staff Working Document of 2014 [SWD (2014) 231/2, § 26], the possible “amalgamation of competences should not lead to a weakening of competition enforcement” or to a “reduction in the means assigned to competition supervision”.

Both principles might be mentioned in the recitals of Regulation 1/2003 or, at least, in a Commission recommendation to Member States.

3. Enforcement toolbox

The consultation document raises the issue of whether the NCAs have a set of investigation and decision-making powers which is adequate for an effective enforcement of EU competition rules.

In Italy, the enforcement toolbox at disposal of the AGCM seems quite comprehensive and well-functioning.

As for the setting of enforcement priorities, so far the priorities of the AGCM emerge *de facto* from the reports of the Authority and the public speeches of its Chairman. There is no clear legal basis for rejecting a complaint only on priority grounds.

We agree with the view according to which, for public enforcement, it is important that competition authorities have the possibility to choose how to allocate their scarce resources in the most effective way. From a legal viewpoint, it might be argued that, following the reasoning of the ECJ in *Automec* (T-24/90), not only the European Commission but also national competition authorities should be allowed to reject complaints on priority grounds if the complainant can effectively assert his or her rights before the national courts.
The presumption is that private enforcement works adequately for the protection of the rights of any affected party. A good transposition of Directive 2014/104/EU in all Member States will certainly help.

In order to encourage Member States to grant NCAs the power to set priorities, the criteria set in *Automec* could be recalled either in a recital of Regulation 1/2003 or in a Commission recommendation.

On more general grounds, the ECN might promote as a best practice the indication by NCAs of their enforcement priorities, to stimulate complaints in the targeted areas of interest and, moreover, ensure effective accountability to the Parliament and to the public opinion.

### 4. Fining powers

Compared with other EU legislative acts, Regulation 1/2003 does not include specific provisions aimed to ensure that the sanctions imposed by NCAs are effective, proportionate and dissuasive. As acknowledged in the consultation document, Member States have chosen different systems (administrative, criminal, etc.) for the enforcement of competition rules. As for Italy, the system of administrative fines established by Law no. 287/1990 is largely modelled on the system provided for the Commission by Regulation 1/2003.

A full harmonization of sanctions in the different Member States seems unrealistic. On the other hand, recent pieces of EU legislation, like the draft GDPR, show that it is possible to set some basic common rules on administrative fines (legal maximum etc.), while preserving the faculty for the legal systems of Member States which do not provide for administrative fines to adopt legal remedies which are effective and have an equivalent effect.

As for the methodology for calculating fines, in our view Member States should maintain the possibility to test solutions which may become best practices within the ECN. In Italy, for example, the 2014 AGCM guidelines on fines for infringements of competition law provide that, under strict conditions, the adoption and enactment of a specific antitrust compliance program can be taken into account as a mitigating factor. Should experience show that this approach contributes to the effective implementation of competition law, this provision could be taken as a model by other competition authorities.
5. Leniency

Effective leniency regimes are crucial instruments in the fight against secret cartels. Recently, the lack of a one-stop shop for leniency applications in the EU has clearly emerged from the judgment of the Court of Justice in case C-428/14, DHL Express/AGCM. According to the Court, in the current legal context “coexistence and autonomy ... characterise the relationships between the EU leniency programme and those of the Member States”.

In this context, and taking into account the differences existing among leniency programmes within the ECN, the effective handling of a leniency application for a cartel involving several Member States is extremely complex. In order to encourage the use of leniency applications through enhanced legal certainty, it would be important to promote EU legislative initiatives aimed to establish a stronger coordination and finally lead to a one-stop-shop system for leniency applications.

A EU legislative initiative would be useful also to set common rules on the protection of leniency material beyond the context of civil damages actions before EU national courts (i.e. beyond the provisions of directive 2014/104/EU).

6. Fairness of competition proceedings

Any discussion of whether and how the enforcement powers of NCAs have to be strengthened should take into account the need to ensure a high level of procedural guarantees, in order to comply with the indications of the European Court of Human Rights. Indeed, the ECHR case-law not only stated that the enforcement decisions adopted by competition authorities must be subject to a full judicial review, but also pointed out that some fundamental safeguards should be present in the course of the administrative proceedings (see Grande Stevens judgment, March 4, 2014).

Also in this respect, a revision of Regulation 1/2003 can take inspiration from the draft GDPR, which provides that “The exercise of the powers conferred on the supervisory authorities (...) shall be subject to appropriate safeguards, including effective judicial remedy and due process, set out in Union and Member State law in accordance with the Charter of Fundamental Rights of the European Union”. Due process implies, for instance, the right to receive a statement of objections.
Finally, an important step towards a level playing field in terms of guarantees in competition law enforcement in the EU would be the introduction of a common European regime on the subjective scope of legal professional privilege. Instead of waiting for a bottom-up harmonization of rules in the Member States, the Commission might propose a common definition of independent legal advice, i.e. of the requirements which must be met by in-house counsels for their legal advice to be privileged, accompanied by specific rules aimed to preserve the effectiveness of the investigation powers of the Commission and NCAs.